No. 12387

In The United States Court of Appeals
For the Ninth Circuit

RALPH CASEY, GEORGE LACLAIR and EDWARD PLESA, *Appellants*,

— VS. —

UNITED STATES OF AMERICA, *Appellee*.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF FOR THE APPELLANTS

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JURISDICTION

This action was commenced by the United States upon the return of a true bill by a Grand Jury indicting the appellants on seven counts charging violations of Sections 301 and 318, Title 47, United States Code, and Section 371, Title 18, United States Code, punishable under provision of Section 501, Title 47, U.S.C.A. Judgment was entered in the United States District Court for the Western District of Washington, Northern Division, on September 12, 1949, upon a verdict of guilty as to Counts I, II, III, IV, V and VI of the indictment. Notice of Appeal was given by the Appellants on September 19, 1949. A mandate dismissing the appeal was issued on February 10, 1950, by the United States Court of Appeals for the Ninth Circuit, but subsequently an order recalling said mandate and vacating the order dismissing the appeal, judgment of dismissal, and extending the time to file reporter's transcript was issued on March 14, 1950.

The jurisdiction of the district court was invoked under Title 28, Section 1355, United States Code (the New Federal Judicial Code). The jurisdiction of this court rests on Section 1294, Title 28, United States Code (the New Federal Judicial Code).

QUESTIONS PRESENTED

1. Were the Constitutional rights of the appellants, as guaranteed them by the Fourth and Fifth Amendments to the Constitution of the United States of America and by Article I, Section 7, of the Constitution of the State of Washington, denied them by the admission in evidence of property seized by federal administrative officers, without a search warrant, said property being seized for the purpose of obtaining evidence upon which to base an arrest—objection to the use of the property seized having been timely made by motion to suppress the evidence and by a subsequent motion to exclude the evidence unlawfully seized?

2. Was the protection afforded by Congress by Section 605 of Title 47, United States Code (Section 605, Title 47, U.S.C., June 19, 1934, c. 653, Section 605, 48 Stat. 1103) forbidding persons not authorized by the sender from intercepting any radio communication denied the appellants by the trial court in admitting in evidence, over objection, testimony of witnesses of the substance of intercepted radio signals?

3. Does "plain error" exist in the court's charge to the jury on Counts IV, V and VI as would warrant a reversal of the conviction of appellants on these counts

because the court's charge was not in accord with the law and therefor prejudicial?

4. Did the court err in failing to set aside the verdicts of the jury on Counts I to VI, inclusive, of the indictments as to all three appellants on the ground that the appellee had failed to prove the material elements of the charges contained in the indictments, timely motion having been made to arrest judgment?

5. Are Sections 301 and 318, Title 47, U.S.C., insofar as they delegate authority to the Federal Communications Commission to exercise discretion in the determination to waive or modify the provisions of said section and to arbitrarily determine whom shall be prosecuted for violation thereof, unconstitutional as a delegation of legislative power?

SPECIFICATIONS OF ERROR

The assignments of error may be summarized as follows:

1. The District Court erred in denying appellants' motion to suppress evidence obtained by unlawful search and seizure and to return evidence seized thereby, and erred in refusing to exclude said evidence at the trial.

2. The District Court erred in denying appellants' motion to exclude evidence seized by unlawful search and seizure at the trial.

3. The District Court erred in denying appellants' motion to dismiss the indictment and each of the counts thereunder as to all three appellants.

4. The District Court erred in admitting the testi-

mony of two witnesses as to messages intercepted by them upon failure of the Government to connect same with the appellants and in denying appellants' motion to strike same by its failure to rule thereon.

5. The District Court erred in the admission of testimony as to signals and receptions obtained by unlawful interception thereof in violation of Section 605, Title 47, U.S.C., and by denying appellants' motions to exclude same.

6. The District Court erred in its charge to the jury on Count IV that the use and operation of a radio station without a license was a violation of Section 318, Title 47, U.S.C.; that the count on which the charge was based as set forth in the indictment was the broadcasting without an operator's license; that two separate and distinct offenses were incorporated in the court's charge on Count IV and that said charge was not in accordance with the law and was prejudicially erroneous.

7. The District Court erred in its charge to the jury on Count V that the use and operation of a radio station without a license was a violation of Section 318, Title 47, U.S.C.; that the count on which the charge was based as set forth in the indicement was the broadcasting without an operator's license; that two separate and distinct offenses were incorporated in the court's charge on Count V and that said charge was not in accordance with the law and was prejudicially erroneous.

8. The District Court erred in its charge to the jury on Count VI that the use and operation of a radio

station without a license was a violation of Section 318, Title 47, U.S.C.; that the count on which the charge was based as set forth in the indictment was the broadcasting without an operator's license; that two separate and distinct offenses were incorporated in the court's charge on Count VI and that said charge was not in accordance with the law and was prejudicially erroneous.

9. The District Court erred in its failure to set aside the verdict of the jury on Counts I, II, III, IV, V and VI of the indictment as being contrary to the weight of the evidence.

10. The District Court erred in entering judgment of conviction on all six counts as to all three appellants.

11. The District Court erred in its failure to grant appellants' motion for a new trial.

STATEMENT

This is a criminal action brought by the United States of America against the appellants based on the return of a true bill by a grand jury charging the appellants with violations of Title 301 and Title 318, U.S.C., punishable under Section 501, Title 47, U.S.C., and the violation of Section 371, Title 18, U.S.C.

As the result of a complaint made by the Police Department of the city of Everett, Washington, to the Federal Communications Commission in Seattle, Washington, to the effect that an unlicensed radio transmitter had been used by unknown individuals to bilk race track "bookies" out of a large sum of money, the officer in charge of the Federal Communi-

cations Commission in Seattle commenced an investigation for the purpose of locating said transmitter. The investigation was commenced on or about January 25, 1949 (R. 90-91, 207-208). No complaints other than this were received between that time and February 7, during which time the investigation had been proceeding by the F.C.C., excepting from two amateurs who heard an unidentifiable signal about 7:10 P.M. on February 7, 1949, in the State of Oregon (R. 40-41, 48-49). The first report indicated that the broadcast was being made on a frequency of 3936 kilocycles (R. 52). The signals heard on February 7 were on a frequency of approximately 3540 kilocycles. The Federal Communications Commission investigators were unable to locate any unauthorized signal on a frequency of 3936 kilocycles, but did hear a voice testing for modulation on a frequency of 3540 kilocycles (R. 53). Because they heard no call letters, they concluded that they were listening to an unlicensed station.

On February 10, 1949, at about 12:26 P.M., the investigators again heard a signal which they concluded was emanating from the Benjamin Franklin Hotel, located on the corner of Fifth and Virginia Streets in Seattle, Washington (R. 66-67). Three Federal Communications Commission investigators entered the hotel, and, using a direction finder, determined that the signal was coming from room 1217. The investigators did not know at this time to whom the room had been registered, nor had they seen the persons registered in that room. The investigator in charge heard a voice saying, "Testing 1-2-3-4 for

modulation." This was at 1:46 P.M. The Federal Communications Commission investigators returned to the lobby and checked the hotel records and discovered that the room was registered in the names of the appellants (R. 71). The investigator in charge then left the hotel and went to the United States Court House to secure a warrant for the arrest of the appellants. He left at about 1:52 P.M. Two other investigators remained in the lobby of the hotel for a few minutes, and then returned to their office. Upon arriving there, one of them received a telephone call (from the hotel manager), and he and his partner then went immediately to the Motor Ramp Garage, a garage not connected with the hotel but independently operated, located at 6th and Westlake, Seattle. They arrived at the garage at 2:15 P.M. The Motor Ramp Garage is approximately eight blocks from the Federal Court House and is approximately two blocks from the Benjamin Franklin Hotel. Both employees stayed in the garage for approximately ten minutes, one then left the garage for about the same time, and then returned and stayed there until approximately 3:15 or 3:20 P.M. (R. 140). When they first entered the garage, they talked to an attendant there, had the attendant point out the car of the appellants (a 1948 Packard convertible coupe) (R. 141-142), asked the attendant to unlock the car, which was done, and they then searched the automobile, returned the baggage to the car, and one of them then had a telephone conversation with the engineer in charge of the Federal Communications Commission, as the result of which he went out to obtain the services

of a policeman to prevent the appellants from moving the car in the event they attempted so to do until a warrant for their arrest could be served (R. 143). Immediately before these two men went to the garage, that is, somewhere between 1:52 P.M. and 2:15 P.M., they telephoned the attendant at the garage requesting him to disable the car so that it could not be moved prior to the arrest of the appellants, which was done (R. 224-228). A warrant for the arrest of the appellants was subsequently issued and was served by Marshal Scully upon the appellants in room 1217 of the Benjamin Franklin Hotel at 3:20 P.M. A search was made by the marshal of the room at the time of the arrest which disclosed nothing (R. 72-74). Following the arrest, the Federal Communications Commission investigators again returned to the Motor Ramp Garage and removed the articles theretofore discovered from the automobile, which articles consisted of radio transmitting equipment and a receiver.

Between 1:47 P.M., when the Federal Communications Commission investigator went to the courthouse to get a warrant for arrest, and 3:20 P.M., when the arrest was made, a search had been made of the appellants' automobile in a garage several blocks from the place where the arrest was made subsequently, said search being made without a warrant, although a magistrate was then available and no apparent necessity for a search without a warrant existed (R. 108, 155, 19-21).

Motion to suppress the evidence thus obtained was made prior to trial and was denied. Appellants were sentenced under Section 501 of Title 47, U.S.C.A.,

to serve terms of penal servitude, although that section requires that violations of Section 301 and 318, Title 47, U.S.C.A. must have been willful and knowing before the penalty attached, and the testimony of the appellants negatives any intention of wrongdoing or knowledge that the equipment seized by the Federal Communications Commission investigators was in operating order (R. 250-254, 256, 269, 275). The testimony of appellee is to the same effect—that the receiving apparatus was not tested and they were unable to say whether it would work or not (R. 108).

Count I of the indictment charged that the appellants on February 7, 1949, had unlawfully, willfully and knowingly used and operated certain apparatus for the transmission of energy, communications and signals by radio from the State of Washington to Portland, Oregon, without a station license.

Count II charged the appellants with having operated a radio station without a license on February 5, 1949, and with the transmission of energy from the State of Washington to a vessel sailing upon the navigable waters of the United States, to-wit: Puget Sound.

Count III charged the appellants with having, on February 10, 1949, unlawfully, willfully, and knowingly transmitted energy by radio, without having first obtained a station license, from one place within the State of Washington to other places within the State of Washington in such a fashion that the effects of the use and operation of the radio extended beyond the boundaries of the State of Washington and caused

interference with the transmission of energy, communications and signals from places in other states to places within the State of Washington, in violation of Section 301, Title 47, U.S.C.

Count IV charged the appellants with having on February 7, 1949, unlawfully, willfully and knowingly used and operated certain apparatus for the transmission of energy, communications and signals by radio from one place in the State of Washington, to Portland, Oregon, without having first obtained a radio operator's license, in violation of Section 318, Title 47, U.S.C.

Count V charged appellants with having, on February 5, 1949, unlawfully, willfully and knowingly operated a radio and having transmitted energy from Seattle to a vessel on the navigable waters of the United States, to-wit: Puget Sound, without having first obtained a radio operator's license, in violation of Section 318, Title 47, U.S.C.

Count VI charged the defendants with having, on February 10, 1949, in Seattle, Washington, unlawfully, willfully and knowingly used and operated a radio for the transmission of energy, communications and signals from one place in the State of Washington to other places in the State of Washington when the effects thereof would extend beyond the borders of the State of Washington and cause interference with the transmission of energy, without having first obtained a radio operator's license, in violation of Section 318, Title 47, U.S.C.

Count VII charged the appellants with conspiracy to willfully, unlawfully and knowingly operate apparatus for the transmission of energy, communications and signals by radio without a station license having first been obtained from the Federal Communications Commission, and alleged a series of overt acts indicating the transmission of energy within the State of Washington when same would cause interference with the transmission of energy, the transmission of signals to Portland, Oregon, and to a vessel on the navigable waters of the United States, all in violation of Section 318, Title 47, U.S.C., and Sec. 371, Title 78, U.S.C.

The appellants were tried by a jury and were found guilty of all counts except Count VII, the count charging conspiracy. Motion for a new trial was filed on September 10, 1949. Judgment, sentence and commitment was entered by the District Court on September 12, 1949. Notice of Appeal was given by the appellants on September 19, 1949, and an order dismissing the appeal was entered on the 9th day of January, 1950, for the reason that appellants had purportedly failed to remit the estimated cost of printing the record. On February 10, 1950, the court issued a mandate * * * and subsequently, on March 14, 1950, this court entered an order recalling its mandate, vacating the order dismissing the appeal and judgment of dismissal, and extending the time to file the reporter's transcript, thereby reinstating the appeal.

ARGUMENT

I.

The Search and Seizure Without a Search Warrant, Conducted by Federal Administrative Officers, of Appellants' Automobile, for Evidence to Be Used in Support of a Warrant for Arrest and Subsequent Indictment Was Unlawful and Unreasonable.

The appellants contend that their motion to suppress evidence obtained as a result of an unlawful search and seizure should have been granted and the admission in evidence of radio equipment seized by administrative officials was prejudicial to their rights guaranteed by the Fourth and Fifth Amendments to the United States Constitution, the search and seizure having been made without a warrant, not incidental to a lawful arrest, purely for the purpose of securing evidence with which to support an indictment, and for identification purposes only.

Appellants further contend that should the search and seizure be construed to have been incidental to a lawful arrest, said search and seizure was unreasonable and violative of the Fourth and Fifth Amendments to the Constitution in that there was "no compelling reason" to justify the absence of a search warrant, "no inherent necessity" or situation making a search without a warrant reasonable; that the area searched was beyond the "immediate possession and control" of the appellants and not within any permissible area of search incidental to a lawful arrest.

The Fourth Amendment provides:

"The right of the people to be secure in their

persons, houses, papers, and *effects** against unreasonable searches and seizures shall not be violated and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Article I, Section 7, Washington State Constitution, provides:

"Invasion of Private Affairs or Home Prohibited.—No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

The Fifth Amendment provides:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury * * * nor shall be compelled in any criminal case to be a witness against himself * * *."

Section 781 of Title 49, U.S.C., defines contraband articles and provides for the seizure and forfeiture of carriers transporting contraband articles * * *:

"(b) As used in this section the term 'contraband article' means — (1) any narcotic drug which has been or is possessed with intent to sell or offer for sale — (2) any firearm, with respect to which there has been committed any violation of any provision of the National Firearms Acts—(3) any falsely made, forged, altered, or counterfeit coin or obligation or other security of the United States or any foreign country * * *."

The power to make an arrest is specifically set forth in Title 18, Section 3041, U.S.C.A. and confers the

*Emphasis supplied.

authority to make an arrest for any offense against the United States upon any justice or judge of the United States, or by any United States Commissioner, chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, *justice of the peace, or other magistrate** of any state where the offender may be found. Section 3052, Title 18, U.S.C.A., confers the power to make an arrest without a warrant, upon reasonable grounds on which to believe that a felony has been committed upon members of the Federal Bureau of Investigation; Section 3053 confers this power of arrest upon U.S. marshals and deputies.

It is elementary that only unreasonable searches are prohibited by the Fourth Amendment. *Carroll v. United States*, 267 U.S. 132. If legally obtained, the radio equipment seized was competent evidence in establishing the corpus delicti and identifying the appellants as parties sought in an investigation of unauthorizzed radio transmissions.

A search without a warrant may be made as incident to an arrest, but such search is dependent initially on a valid arrest. The dicta of the Supreme Court of the United States in the case of *Rabinowitz v. United States*, 255 U.S. 298, cannot be reasonably expanded to the point where it can be used as authority for any interpretation that a search made prior to an arrest disclosing evidence with which to support the warrant of arrest, and ultimately an indictment and conviction of operating a radio station without

*Emphasis supplied.

a license, is reasonable, because the articles seized in that search were contraband as defined by Section 781 of Title 49, U.S.C., and as such were subject to seizure without a warrant.

Searches of automobiles have generally involved enforcement of the National Prohibition Act or for contraband articles expressly declared to be subject to seizure and forfeiture by express act of Congress. See *Harris v. United States*, 331 U.S. 145, Section 780, *et seq.*, Title 49, U.S.C. (Liquor).

The contention that an automobile is more vulnerable to a search without a warrant, than other property, has its source in the decision of the Supreme Court in *Carroll v. United States, supra.* It must at all times be remembered that the search permitted by the *Carroll* case was made and its validity upheld under the search and seizure provisions specifically enacted for the enforcement of the National Prohibition Act *and of that Act alone.** Transportation of liquor in violation of that act subjected, first, the liquor, and then the vehicle in which it was found, to seizure and confiscation, and the person "in charge thereof" to arrest. Section 26, Title 2, of the National Prohibition Act, provides in part as follows:

> "When * * * any officer of the law shall discover any person in the act of transporting in violation of the law intoxicating liquor in any wagon, buggy, automobile, water or aircraft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating

*Emphasis supplied.

> liquors transported or possessed illegally shall be seized by an officer, he shall take possession of the vehicle and team, or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof." Section 40, Title 27, U.S.C.A.

In the *Carroll* case, the court reviewed the legislative history of enforcement legislation and concluded:

> "The intent of Congress to make a distinction between the necessity for a search warrant in the searching of private dwellings and in that of automobiles and other road vehicles *in the enforcement of the Prohibition Act* is thus clearly established by the legislative history of the Stanley Act. Is such a distinction consistent with the Fourth Amendment? We think that it is. The Fourth Amendment does not denounce all searches and seizures, but only such as are unreasonable."

The progeny of the *Carroll* case likewise dealt with searches and seizures under this Act. *Husty v. United States*, 282 U.S. 694, 74 A.L.R. 1407 (Liquor).

Relying on the decision of *Carroll v. United States*, *supra*, the District Court refused to grant the motion of the appellants to suppress the evidence obtained from a search, by federal administrative agents, of the trunk of appellants' automobile. Appellants respectfully submit that neither the *Carroll* case nor the horde of cases since decided in reliance thereon, go so far as to permit the search of any automobile, without a search warrant, that may be suspected of being connected with a crime, even on reasonable cause to believe that the automobile contains evidence that

may be connected with the perpetration of a crime, except where there is reasonable ground to believe that the vehicle is being used to carry "contraband" as defined in the statutes.

The rule in the *Carroll* case was predicated on specific legislation and was not intended to be extended beyond the facts of that case. As the Supreme Court said in *United States v. DeRi*, 332 U.S. 581, 584, 585, "Obviously, the court should be reluctant to decide that a search thus authorized by Congress was unreasonable and that the Act was therefor unconstitutional. In vew of the strong presumption of Constitutionality due to an act of Congress, especially when it turns on what is 'reasonable,' the *Carroll* decision falls short of establishing a doctrine that, *without such legislation,** automobiles nonetheless are subject to search without a warrant in enforcement of all Federal Statutes. *This court has never yet said so."**

It is well to observe the caution of the Supreme Court in the *DeRi* case:

> "We need not decide whether, without such Congressional authorization as was found controlling in the *Carroll* case, any automobile is subject to search without warrant *on reasonable cause to believe it carries contraband."** *United States v. ReRi, supra.*

It should again be noted that in those cases discussing the permissibility of searching an automobile without a warrant, the object to be sought was liquor de-

*Emphasis supplied.

cleared by Congress to be subject to seizure and forfeiture whenever found.

It would indeed be stretching the rule laid down in the *Carroll* case to an illogical conclusion to say that the express authorization of Congress declaring liquor to be contraband, and therefore subject to search and seizure, constituted justifiable grounds for permitting the search and seizure by law enforcement officers or by administrative agents of the Federal Government to search any vehicle believed to contain anything that would be of evidentiary value in carrying out that agency's delegation of authority. The basic framework for a police state would be complete if such a rule were adopted.

> "When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent." *United States v. Asendio*, 171 F.2d 122.
>
> "A search and seizure cannot be reasonable, and therefore justified, if it is based solely on the purpose of obtaining nothing but information generally, which may, perhaps, be proof that a crime had been committed. Evidence so obtained is not admissible against the person or persons whose rights have been violated. To admit it would be contrary to the Fifth Amendment in that part which reads 'No person * * * shall be compelled in any criminal case to be a witness against himself'." *Boyd v. United States*, 116 U.S. 616; *Gouled v. United States*, 225 U.S. 298.

Had the officers in this case desired to obtain a warrant for the search of the automobile, it would have been necessary for them to produce evidence

tending to show that the baggage contained articles used in the commission of the offense, or were of a contraband nature; otherwise, the attempt to secure the warrant would have been upon mere information and belief, which the courts have held to be insufficient as a basis for the granting of a search warrant. *United States v. Blich*, 45 F.(2d) 622.

The search here cannot be justified by what was found. The courts have had frequent occasion to point out that a search is not to be made legal by what it turns up. In law, it is good or bad when it starts and does not change character from its success. *United States v. DeRi, supra.*

Federal law enforcement officers, and more particularly Federal adminstrative officers, should not be permitted free rein to search and seize at will. They should not be permitted to do without a warrant what they could not do with a warrant. As was said in *Gouled v. United States, supra,* warrants may not be used as a means of gaining access to a man's office and house and papers solely for the purpose of making search to secure evidence to be used against him in a criminal and penal proceeding, but may be resorted to only where a primary right to search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders possession of property by the accused unlawful and provides that it may be taken.

The rights guaranteed by the Fourth and Fifth Amendments have been declared to be indisputable to

the full enjoyment of personal security, liberty, and private property:

> "It has been repeatedly decided that these Amendments should be liberally construed so as to prevent 'the stealthy encroachment upon, or the gradual depreciation of the rights secured by them, by imperceptible practice of courts or by well-intentioned but mistakenly over-zealous officers'." *Gouled v. U. S., supra*, p. 304

The protection of the Fourth and Fifth Amendments reaches all alike, whether accused of a crime or not, *and including those suspected or known to be offenders*, and the duty of giving it force and effect is obligatory upon all entrusted under our federal system with the enforcement of the laws. *Go-Bart Importing Company v. United States*, 282 U.S. 344.

When it becomes apparent during the trial that there has been an unconstitutional seizure of the property of the accused, the court should exclude the property and any testimony relating thereto given by the government agents who made the unlawful seizure on motion of the accused made after both testimony and property have been introduced in evidence against him. *Amos v. United States*, 255 U.S. 313; *Agnello v. United States*, 269 U.S. 20; *State v. Miles*, 29 Wn. (2d) 921, 190 P.(2d) 740. In the present case, it was error to refuse appellants' motion to strike the testimony pertaining to the equipment unlawfully seized from appellants' automobile.

In the present case, if you remove from the record the evidence of what the officers found upon their search of the automobile, there is little left but suspi-

cion that a crime had been committed. The agents of the Federal Communications Commission "thought" that the people in Room 1217 were those people whose signals they had heard transmitted from time to time. They had no basis on which to search without a warrant. This case is readily distinguishable from those cases permitting officers to seize liquor, stamps, narcotics, or other contraband, the possession of which is, standing alone, illegal. By no stretch of the imagination could it be said that the presence of radio equipment of any kind, unless stolen, in an automobile away from the place of arrest was evidence of criminality.

Nor can the search be justified as an incident to a lawful arrest. A search is never permitted where it is general or exploratory for whatever might be turned up.

> "The authority of officers to search a person's house or place of business contemporaneously with his lawful arrest therein upon a valid warrant of arrest is certainly not greater than that conferred by a search warrant issued upon adequate proof and sufficiently describing the premises and and things sought to be obtained. The informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests. Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime." *United States v. Kirschenblatt*, 16 F.(2d)

202, 51 A.L.R. 416; *Go-Bart Importing Company v. United States, supra.*

It has been said that "what is a reasonable search is not to be determined by any fixed formula." *United States v. Rabinowitz, supra.* If the search was made as an incident to arrest, it then becomes necessary to determine whether such search was, under the circumstances, reasonable. The appellants contend that, assuming the search was made as an incident to their arrest, such search and seizure was unreasonable and unwarranted by any interpretation, even the most liberal, of the rules hertofore expressed by the Federal Courts.

There is no dispute that objects that have been utilized in perpetrating a crime for which an arrest is made are properly subject to seizure, There is, however, a limitation on the permissible area of search for evidence of a crime. Though this area appears to gradually be expanding as time increases and the period of the Revolution of 1776 diminishes in the parade of history, it should not be expanded so as to include the whole world.

The right to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it is committed seems to have stemmed not only from the acknowledged authority to search the person, but also from the long standing practice of searching for other proofs of guilt found upon arrest. *Weeks v. United States*, 332 U.S. 383, 392; *U. S. v. Rabinowitz, supra.* It has become the accepted rule that the premises where the arrest is made, *which premises are under the*

control of the person arrested, and where the crime is being committed, are subject to a search wihtout a search warrant. Such searches have been held not to be "unreasonable." The court in the *Rabinowitz* case laid down a standard of an extremely flexible character and states:

> "The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable. That criteria, in turn, depends upon the facts and circumstances—the total atmosphere of the case." *United States v. Rabinowitz, supra.*

Certainly the most liberal construction of the court in the *Rabinowitz* case, wherein the search was limited to defendant's place of busness, a one room office open to the public, should not be extended beyond the facts of that particular case and distorted to the extent that would be necessary to give rise to a rule of law that woud condone the search of an automobile located in a garage—some distance away from the place of arrest—where the automobile is not believed to be carrying "contraband" and where the automobile is not in "the immediate possession and control" of the parties arrested.

The illegality of the first search cannot be absolved by the later search purportedly made as an incident to the arrest where made prior to the time a warrant of arrest was obtained and again after appellants had been taken to the Federal Court House for arraignment, particularly where such search was conducted by federal administrative officers in the absence of any United States Marshal or officer authorized by law to serve a warrant, and without a search warrant.

It is evident that in the instant case, the search was made solely for the purpose of seizing whatever might be turned up on examination of the baggage in the hope that it might be of evidentiary value in connecting the appellants with a federal crime under investigation.

> "But to assume that this exception of a search incidental to arrest permits a freehanded search without warrant is to subvert the purpose of the Fourth Amendment by making the exception displace the principle." Justices Frankfurter and Jackson, dissenting in *United States v. Rabinowitz, supra.*

II.

That the Mandate of Congress in Section 605 of Title 47, U. S. Code, Prohibiting the Divulgence of the Contents of Intercepted Communications by a Person Unauthorized so to do by the Sender Thereof Was Ignored by the Trial Court in Admitting Testimony of Witnesses as to the Substance of Radio Messages Intercepted by Them Without the Consent or Approval of the Senders.

The appellants contend that the refusal of the trial court to strike the testimony of witnesses as to the context of radio messages intercepted by them violated the prohibition of Section 605, Title 47, U.S.C., and constituted reversible error.

The pertinent portions of the code applicable to the issue are as follows:

> "* * * and *no person* not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such inter-

> cepted communication to any person; * * * provided that this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication, broadcast, or transmission by amateurs or others *for the use of the general public*, or relating to ships in distress." (Section 605, Title 47, U.S.C., June 19, 1934, c. 652, Section 605, 48 Stat. 1103)

Whether the mandate of Congress which prohibits the divulgence of signal communications as expressed by tht United States Supreme Court in the case of *Nardone v. U.S.*, 302 U.S. 378 (1st case), 308 U.S. 338 (2nd case), is likewise applicable to the transmission of energy, signals and messages by radio, appears to be one of first impression.

The appellants urge that the strict prohibition of Section 605, Title 47, U.S.C., is applicable to bar the admission in evidence of testimony presented by witnesses, of the contents of messages transmitted by radio where such transmissions are either intra or interstate transmissions and not intended for the use of the general public—consent to the divulgance of the contents of the messages not having first been obtained.

Intrastate as well as interstate communications are within the interdiction of the Federal Communications Commission Act, 47 U.S.C.A. 605; *Weiss v. U.S.*, 308 U.S. 321, 327. The prohibition against the divulgance of the contents of telephone, telegraphic or radio communication rests not on any Constitutional basis but rather on act of Congress. *Beard v. Sanford*, 110 F.(2d) 527 (1949).

A message is "intercepted" within the prohibition

of the Communications Act when anyone intercepts a message to whose intervention the communicants do not consent, irrespective of the means employed to accomplish the interception. Consent of both sender and receiver is necessary before the contents of the message can be divulged. *U.S. v. Polakoff*, 112 F.(2d) 888 (1940).

The case of *Nardone v. U.S.*, 302 U.S. 378, 82 L. ed. 515, 84 L. ed. 307, prohibited the introduction at trial of evidence obtained by wire tapping. A long line of cases have since reiterated the rule of the interdiction of Congress.

Appellants submit that by analogy the contents of radio messages not intended for the use of the general public is protected by Section 605, Title 47, U.S.C., from being divulged without the authority of the sender. The divulgance of this information falls within the prohibition of the *Nardone* case. The testimony of witnesses as to the contents of the messages should have been excluded.

Sablowski v. United States, 101 F.(2d) 183.

See also:

United States v. Gruber, 39 F. Supp. 292 (1941).

III.

That the District Court Committed Plain Error in Its Charge to the Jury on Counts IV, V, and VI, Which Counts Were Based Upon Section 318 of Title 47, U.S.C., and Which Error Was Extremely Prejudicial to the Appellants.

The pertinent language of the statute involved reads as follows:

> "The actual operation of all transmitting apparatus in any radio station for which a station license is required by this chapter shall be carried on only by a person holding an operator's license issued hereunder, and no person shall operate any such apparatus in such station except under and in accordance with an operator's license issued to him by the Commission; * * *."

To this section there is a provision permitting the Commission to waive or modify the foregoing provisions excepting as to (1) stations for which licensed operators are required by international agreement, (2) stations for which licensed operators are required for safety purposes, (3) stations engaged in broadcasting, and (4) stations operated as common carriers, and a further provision giving to the Commission the power to make special regulations governing the granting of licenses for the use of automatic radio devices or for their operation. Section 318 must be considered in the light of the purpose of this legislation, which is disclosed by Section 301 of Title 47 and which is, among other things, to "maintain the control of the United States over all the channels of interstate and foreign radio transmission" and which provides that said regulation prohibits the operation

of apparatus for the transmission of energy, communications, or signals by radio.

What is a radio station? The answer apparently is found in Section 318 which limits the power of the Federal Communications Commission to waive or modify the provisions of that law with regard to the stations for which operators are required by international agreement, where operators are required for safety purposes, stations engaged in broadcasting, and stations operated as common carriers. An amateur station, a "walkie-talkie," radio activated appliances, garage doors, etc., would obviously not be included. Neither of these sections, therefore, would ban or bar the particular operation with which these appellants are charged. Only by the exercise of the discretion given by the Act to the Federal Communications Commission officers can the acts and conduct charged to these appellants subject them to prosecution for the commission of a crime.

The court in its instructions on Counts IV, V, and VI, which were based on Section 318, told the jury that if they found that a signal had been transmitted on February 5, 7, and 10th, by the appellants, and if the appellants had no radio operator's license, and if the appellants did "unlawfully, willfully and knowingly" use and operate a radio station, then they would be guilty of the count as charged. Section 318 had only to do with the transmission of a radio signal without an operator's license. It had nothing whatever to do with the operation of a radio station. A radio station was not defined to the jury, nor were they told that as a matter of law, the operation of the "walkie-

talkie" which the appellants were charged with operating, constituted a violation of Section 318. The jury was left completely in the dark to speculate as to what was a radio station, and were left further completely in the dark as to what constituted a willful and knowing violation of the section. It will be noticed that the only instruction as to intent followed the charge on Count VII, as to which count the jury found the appellants not guilty. After instructing on Count VI, the court instructed on Count VII, mentioning that count particularly by number seven times.

The court, therefore, included in its charge on these three counts the violation of Counts I, II and III which was the operation of a radio station without a license in violation of Section 301, and made the violation of Section 301 a material allegation of Counts IV, V and VI so that the jury, having determined that the appellants were guilty of Counts I, II and III had practically convicted them of Counts IV, V and VI before they ever came to a consideration of the appellants' guilt as to these particular counts. In other words, the findings on Counts I, II and III practically forced the jury to convict on Counts IV, V and VI. It should be noted in connection with these counts, also, that the jury was instructed that the transmission of the radio signal as charged to the appellants caused interference with the transmission of energy, communications and signals. The only testimony in the case as to any interference was that of witnesses Hart and McPherson, who testified they heard an unidentifiable signal on February 7 between 7:10 and 7:30 P.M., and before their net time of 7:30 ap-

proached. There was no evidence in the case of any interference on any date other than on February 7 and that signal was heard prior to the time that the amateur group had commenced their communications (R. 40, 47 and 49).

We submit, therefore, that elements were injected into the charges on Counts IV, V and VI which were not supported by the testimony and which were not in accord with the law.

Appellants concede that the patent error contained in the court's charge as to these counts was not brought to the attention of the court by exception. Under the rules of criminal procedure for the District Courts of the United States adopted by the Supreme Court of the United States, Rule 52, provides as follows: "*Harmless Error and Plain Error.* (b) Plain errors or defects affecting substantial rights may be noticed, although they were not brought to the attention of the court." We submit that these instructions and the instructions as a whole as to the charge as to each of the six counts were erroneous and that, inasmuch as the substantial rights of the appellants are involved, this court may take notice of said errors.

U.S. v. Atkinson, 297 U.S. 157;

Dowell, Inc. v. Jowers, 166 F.(2d) 214, 2 A.L.R.(2d) 442, cert. den. 334 U.S. 832

(holding that when it is apparent from the face of a record that a miscarriage of justice may have occurred because of failure of counsel to make timely objection to errors, the reviewing court will, upon its own motion, consider such errors).

Appellate courts may, at their own instance, notice error to which no exception has been taken if the errors are obvious or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings. *U.S. v. Socony Vacuum Oil Co.*, 310 U.S. 150.

IV.

That the Court Erred in Failing to Set Aside the Verdict on Counts I, II, III, IV, V, and VI of the Indictment, the Evidence Adduced Being Insufficient to Warrant a Conviction on any of Said Counts.

Sections 301 and 318 of Title 47, U.S.C., may be described as regulatory or administrative law as distinguished from penal law or laws providing for penalties for violation thereof. It will be noted from an examination of these laws that there is placed within the power of the Federal Communications Commission the power to regulate or enjoin or prevent the unauthorized transmission and reception of radio communications. No penalty is contained in either Section 301 or Section 318 for violation, and as testified to by Herbert Arlowe, the chief engineer of the Federal Communications Commission in Seattle, in the twenty-one years that he has been connected with the Federal Communications Commission, he has prosecuted but two cases involving violation of these particular sections (R. 88-89, 281-285). One of the cases prosecuted was in San Francisco and one in Seattle. The ordinary course of conduct by an investigator for the Federal Communications Commission is to endeavor to obtain proof of the operation of an unlicensed transmitter be-

fore taking any action. Mr. Arlowe testified as follows:

"A. We determine what kind of operation they are doing, first, whether they have ever had a license, what type of operation they are carrying on. If it looks like they are making a broadcast with an unlicensed transmitter and that they are old enough to realize what they are doing, and if they are using the radio for more than just to test or in preparation for getting a license.

Q. Then you go and talk to them, don't you, and find out what they are doing?

A. No, we don't. We judge from what they say on the air, what they do with it.

Q. In other words, if any broadcast is just within the State of Washington and doesn't go out into the navigable waters of the United States or across state lines, it isn't a violation of your regulations or laws, is that right?

A. Not exactly right, no.

Q. Will you tell the court and jury — —

A. The communications rules provide that these low power devices, where the maximum signal is one-sixth of one wave length and at that distance is 15 microvolts per meter, not more, may be used to remotely control radio controlled objects such as garage door operators or other devices that can be operated with a relay. Now, after that rule was adopted, then the manufacturers of phonograph records, phonograph record players, received permission and received type approval numbers for equipment to be used without any antenna, and measurements were made to indicate that on those that received type approval, that the signal did not radiate

> from that particular receiver, or phonograph oscillator, I should say, more than 15 microvolts per minute, 1 over 2 pi times waves length, roughly, one-sixth wave length." (R. 283-284)

We shall lift out of the context of Mr. Arlowe's testimony the following significant phrase. "* * * *and if they are using the radio for more than just to test or in preparation for getting a license.*" In this case, there is no testimony of any nature which would indicate that this small, portable "walkie-talkie," which was purchased by the appellant LaClair for $50.00, and which they intended to use at the golf club which they purchased and which was incidentally, purchased after their arrest, was intended to be used for anything other than in conjunction with this golf club and shooting range which they intended to operate with their golf course (R. 251-253, 279-280). The testimony of the Government's witness to the effect that they did not interfere with such devices excepting when they were actually in operating condition makes their conduct in this instance subject to the closest scrutiny.

Underlying the arrest of these appellants is the significant fact that the Everett Police Department had enlisted the aid of the Federal Communications Commission in trying to locate a radio transmitter which had been used by certain persons to obtain money from bookmakers in Everett, Washington (R. 206-208). Co-incidentally, the appellants at that particular time were testing a piece of equipment which they intended to use on a golf course. The Federal Communications agents zealously attempted to help

the Everett Police Department in running down the men who had taken the Everett bookmakers. Bookmaking in the State of Washington is illegal. Bookmakers can be prosecuted under state law for their illegal activities. It is very strange, therefore, that rather than attempting to locate and prosecute the individuals who were guilty of bookmaking under the laws of the State of Washington, that the Police Department of that city should enlist the aid of a federal agency to track down the persons suspected of taking the bookmakers. They determined to find an unlicensed transmitter. They found one. There is no contention, nor has there been throughout this entire record, that these appellants were the ones who had operated radio equipment in Everett, and, as has been pointed out before, there is no testimony to indicate that the receiver of the equipment unlawfully taken from the appellants' car was in operating condition. There was no evidence to go to the jury that they had willfully and knowingly violated Sections 301 and 318 of Title 47, U.S.C.A. The penal provision had to be inflicted under Section 501 of Title 47, U.S.C.A., which provides:

> "Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omissions or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty

(other than a forfeiture) is provided herein, by a fine of not more then $10,000 or by imprisonment for a term of not more than two years, or both."

It is also significant that there has been but one prosecution in this district in the last twenty-one years for a violation of this law. The appellants did not know even when they were arrested that they had committed any offense. There being no evidence that the equipment would operate, there being no evidence that any signal was given other than conceivably would be given in an effort to test the equipment, there being no testimony in the record, with the one exception of the signal heard in Oregon on February 7, (other than that of the Federal Communications Commission investigators as to the signals intercepted by them which even they could not testify were heard or received by the receiver) and all of the testimony indicating that at the time the signals were transmitted, the person attempting to receive the same was in direct view of the person broadcasting the signal and who was attempting to get a response from the person intended to receive the same so as to indicate whether or not the equipment worked, there was nothing to go to the jury on the question of the operation of a radio station knowingly and willfully without a license. A man cannot bbe guilty of operating that which is not capable of operation, and the record is silent that this equipment was in working order, although the testimony of the appellants themselves is to the effect that they heard no signals.

V.

That Sections 301 and 318 of Title 47, U.S.C.A., Insofar as They Delegate Authority to the Federal Communications Commission to Exercise Discretion in the Determination to Waive or Modify the Provisions of Said Section and to Arbitrarily Determine Whom Shall Be Prosecuted for Violation Thereof, Is Unconstitutional.

The Constitutionality of any statute creating a criminal offense may be challenged for the first time on appeal where the matter involves the deprivation of life or liberty. *State v. Diamond*, 27 New Mexico 477, 202 Pac. 988, 20 A.L.R. 1527. *Re*: *Clarke*, 105 Mont. 401, 74 P.(2d) 401.

As we have earlier pointed out in this brief, the Federal Communications Commission was authorized by Congress to waive or modify the provisions of Section 318 excepting for the four classifications involving stations requiring licensed operators (1) by international agreement, (2) for safety purposes, (3) stations engaged in broadcasting, and (4) stations operated as common carriers. The particular offense charged in the indictment in this case involved none of these four classifications and as was testified to, it is the practice and custom of the local Federal Communications Commission office to determine the "kind of operation, if they have ever had a license, what type of operation they are carrying on" (R. 283). The investigator then testified that if, in their opinion, the operator knows what he is doing, and if they are using the equipment for more than just to test or in preparation for applying for a license, then,

according to their interpretation, they can be charged, but the standards by which this determination is made have not been fixed by Congress. The offense charged in the particular indictment before this court is an offense only because the Federal Communications Commission officials in Seattle exercised the discretion to declare it to be one.

How do they determine whether the users of the equipment are doing more than "just testing"? How do they determine that they are using the equipment merely in preparation for getting a license? The tests made by the appellants in the case were made between a period of February 2 to 10 and were unsuccessful according to appellants' testimony. The arrest was made on the 10th. The general rule is well stated in 11 Am. Jur. 947, Sec. 234, as follows:

> "Sec. 234. Reasonable Exercise of Discretion and Arbitrary Power Distinguished.—In all cases where a law provides for the exercise of discretion by administrative officers, in order to be valid and escape the taint of unconstitutional exercise of legislative or judicial authority, the discretion must be lawfully exercised in accordance with established principles of justice. It cannot be a mere arbitrary choice, for it has been said that in the American system of government no room is left for the play and action of purely arbitrary power. A distinction is consequently drawn between a delegation of the power to make the law which necessarily includes a discretion as to what it shall be and the conferring of authority or discretion as to is execution. The first cannot be done, but the second under certain circumstances is permissible.

> "The pracical question which arises in this problem is the determination of what is a proper and reasonable discretion and what is an invalid arbitrary discretion. The generally accepted rule as to this question is to the effect that a statute or ordinance vests an arbitrary discretion in administrative officers with respect to an ordinarily lawful business, profession, or appliance, if it fails to prescribe a uniform rule of action or fails to lay down a guide or standard whereby the exercise of discretion may be measured. Any law which authorizes the issuing or withholdng of licenses, permits, or approvals or sanctions other administrative functions in such a manner as the designated officials arbitrarily choose, without reference to all of the class to which the law under consideration was intended to apply and without being controlled or guided by any definite rule or specified conditions to which all similarly situated may conform, is unconstitutional and void."

It is inconceivable that a conviction based upon the whim and caprice of the investigating agent would be permitted to stand. We submit, therefore, that, insofar as this statute permits the Federal Communications Commission to exercise arbitrary discretion in determining what shall or shall not be classified as a crime, that to that extent this statute is unconstitutional as an unlawful delegation of legislative power.

CONCLUSION

In conclusion we submit that the search and seizure of the equipment taken from appellants' automobile was illegal and wrongful, and that the evidence so obtained should have been suppressed and that all testimony relating thereto should have been excluded. We further submit that the search and seizure was not justifiable as an incident to the arrest, it having been made more than one hour prior to the issuance of a warrant, and further, having been made by an investigator not authorized by law to make an arrest or to serve process. We further submit that at the time of the search and seizure, there was no probable cause existing for the arrest of the defendants; that the evidence was insufficient to sustain the verdict, and that the defendants have been denied their Constitutional rights as provided by the Fourth and Fifth Amendments to the Constitution of the United States and by Article I, Section 7, of the Constitution of the State of Washington. We further submit that the statute upon which these men were indicted and charged is unconstitutional insofar as it purports to delegate to the Federal Communications Commission the power to determine what shall or shall not constitute a crime.

Respectfully submitted,

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October, 1950.

APPENDIX

Section 501, Title 47, U.S.C.A.:

Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided herein, by a fine of not more than $10,000 or by imprisonment for a term of not more than two years, or both.

Sectin 318, Title 47, U.S.C.A.:

The actual operation of all transmitting apparatus in any radio station for which a station license is required by this Chapter shall be carried on only by a person holding an operator's license issued hereunder, and no person shall operate any such apparatus in such station except under and in accordance with an operator's license issued to him by the Commission: Provided, however, That the Commission, if it shall find that the public interest, convenience, or necessity will be served thereby may waive or modify the foregoing provisions of this section for the operation of any station except (1) stations for which licensed operators are required by international agreement, (2) stations for which licensed operators are required for safety purposes, (3) stations engaged in broadcasting, and (4) stations operated as common carriers on frequencies below thirty thousand kilocycles: Provided further, That the Commission shall have power to make special regulations governing the granting of licenses for the use of automatic radio devices and for the operation of such devices.

Section 301, Title 47, U.S.C.A.—License for radio communication or transmission of energy:

It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission * * *. *No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio* (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, possession, or District; or (b) from any State, Territory or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the U.S., or (c) *from any place in any State*, Territory, or possession of the United States to any place in any foreign country or *to any vessel;* or (d) *within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy,* communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) *upon any vessel or aircraft of the United States;* or (f) *upon any* other mobile stations within the jurisdiction of the United States, except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter.

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*Emphasis supplied.